

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MARTIN J. WALSH, Secretary of
Labor, United States Department
of Labor,

Plaintiff,

v.

SL ONE GLOBAL, INC., dba VIVA
SUPERMARKET, a California
corporation; SMF GLOBAL, INC.
dba VIVA SUPERMARKET, a
California corporation, NARI
TRADING, INC., dba VIVA
SUPERMARKET; UNI FOODS, INC.,
dba VIVA SUPERMARKET, a
California corporation; SEAN
LOLOEE, an individual, and as
owner and managing agent of the
Corporate Defendants; and KARLA
MONTOKA, an individual, and
managing agent of the Corporate
Defendants,

Defendants.

No. 2:22-cv-00583 WBS DB

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION TO STRIKE,
OR IN THE ALTERNATIVE
DISMISS, PLAINTIFF'S FIRST
AMENDED COMPLAINT

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Plaintiff Martin J. Walsh, in his capacity as Secretary
of the United States Department of Labor, brought this action

1 against defendants SL One Global, SMF Global, Nari Trading, and
2 Uni Foods, all of which allegedly do business as Viva Supermarket
3 (the "corporate defendants"); Sean Loloee; and Karla Montoya
4 alleging various ongoing violations of federal labor laws at
5 grocery stores operated by defendants. Specifically, plaintiff
6 alleges (1) interference with employees' rights under the Fair
7 Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3); (2)
8 obstruction of the Secretary's investigation under the FLSA, 29
9 U.S.C. § 211(a); (3) violation of minimum wage requirements under
10 the FLSA, 29 U.S.C. §§ 206, 215(a)(2); (4) violation of overtime
11 requirements under the FLSA, 29 U.S.C. §§ 207, 215(a)(2); (5)
12 violation of recordkeeping requirements under the FLSA, 29 U.S.C.
13 §§ 211(c), 215(a)(5); (6) violation of child labor requirements
14 under the FLSA, 29 U.S.C. §§ 212, 215(a)(4); and (7) violation of
15 paid sick leave requirements under the Emergency Paid Sick Leave
16 Act, Pub. L. No. 116-127, 134 Stat. 178 §§ 5101-5111 (2020).
17 (First Am. Compl. ("FAC") (Docket No. 18).)

18 The court does not recite a full background of the case
19 as it has done so in its prior order. (Docket No. 17.) The
20 court's prior order dismissed Counts III and IV for overtime
21 violations as against defendant SL One Global, to the extent that
22 they alleged violations before February 19, 2020, based on the
23 parties' Second Agreement releasing SL One Global from claims
24 relating to violations occurring from February 20, 2018 to
25 February 19, 2020 (the "Agreement Period"). The Order also
26 dismissed the same counts as against all defendants to the extent
27 that they alleged violations occurring prior to April 1, 2019,
28 before which date claims were barred by the applicable statute of

1 limitations.

2 Defendants now move to strike, or in the alternative
3 dismiss, plaintiff's First Amended Complaint. (Docket No. 25.)

4 I. Motion to Strike

5 Rule 12(f) authorizes the court to "strike from a
6 pleading an insufficient defense or any redundant, immaterial,
7 impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The
8 function of a 12(f) motion to strike is to avoid the expenditure
9 of time and money that must arise from litigating spurious issues
10 by dispensing with those issues prior to trial" Fantasy,
11 Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) (quotation
12 marks, citation, and first alteration omitted), rev'd on other
13 grounds, Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 (1994).

14 "Because motions to strike are 'often used as delaying
15 tactics,' they are 'generally disfavored' and are rarely granted
16 in the absence of prejudice to the moving party." Pickern v. 3
17 Stonedeggs, Inc., No. 2:13-cv-1373 WBS, 2014 WL 309552, at *1
18 (E.D. Cal. Jan. 28, 2014) (quoting Rosales v. Citibank, FSB, 133
19 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001)).

20 Defendants do not assert possible prejudice, but rather
21 move to strike on the basis that the First Amended Complaint
22 exceeded the scope of leave to amend granted by this court.
23 However, "[e]xceeding the scope of a court's leave to amend is
24 not necessarily sufficient grounds for striking a pleading or
25 portions thereof." Beavers v. New Penn Fin. LLC, No. 1:17-cv-
26 00747 JLT, 2018 WL 385421, at *3 (E.D. Cal. Jan. 11, 2018)
27 (citing Khan v. K2 Pure Sols., L.P., No. 12-cv-05526 WHO, 2013 WL
28 6503345, at *11 (N.D. Cal. Dec. 4, 2013)); Allen v. Cnty. of Los

1 Angeles, No. CV 07-102-R SH, 2009 WL 666449, at *3 (C.D. Cal.
2 Mar. 12, 2009) (collecting cases). See also Vahora v. Valley
3 Diagnostics Lab'y Inc., No. 1:16-cv-01624 SKO, 2017 WL 2572440,
4 at *2 (E.D. Cal. June 14, 2017) (finding that plaintiff's amended
5 complaint exceeded scope of leave to amend, but denying motion to
6 strike as "premature").

7 Defendants argue that the entire First Amended
8 Complaint should be stricken because "the offending language
9 cannot be stricken from the FAC in a manner that remedies this
10 issue." (Def.'s Mem. at 8.) The court disagrees. The First
11 Amended Complaint merely suffers from imprecise pleading and
12 reliance on a faulty legal theory, as discussed below. The court
13 will therefore deny defendants' motion to strike, and now
14 considers plaintiff's alternative motion to dismiss.

15 II. Motion to Dismiss

16 Federal Rule of Civil Procedure 12(b)(6) allows for
17 dismissal when the plaintiff's complaint fails to state a claim
18 upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).
19 The inquiry before the court is whether, accepting the
20 allegations in the complaint as true and drawing all reasonable
21 inferences in the plaintiff's favor, the complaint has stated "a
22 claim to relief that is plausible on its face." Bell Atl. Corp.
23 v. Twombly, 550 U.S. 544, 570 (2007).

24 As this court held in its prior order, plaintiff may
25 not bring claims alleging that SL One Global violated FLSA's
26 minimum wage and overtime provisions during the Agreement Period,
27 as such claims are precluded by the parties' Second Agreement.
28 (Docket No. 17 at 7.) Defendants argue that plaintiff's

1 reference to the statute of limitations and inclusion of kickback
2 allegations impermissibly include violations occurring during the
3 Agreement Period. The court will address each in turn.

4 A. Reference to Statute of Limitations

5 Defendants object to the allegations that defendant
6 committed various violations “[i]n every workweek during the
7 applicable statute of limitations periods.” (FAC ¶¶ 40, 44.)
8 Defendants argue that by referencing a statute of limitations
9 period that includes some of the Agreement Period, plaintiff is
10 attempting to “covertly” include wage violations occurring during
11 the Agreement Period. (Def.’s Mem. at 4.) In response,
12 plaintiff assures the court that he is not seeking to
13 impermissibly include such claims, and argues that this language
14 was added to comply with this court’s order that Counts III and
15 IV be dismissed as to violations occurring outside the applicable
16 statute of limitations periods. (Pl.’s Opp’n at 5-6.) Although
17 the First Amended Complaint could be clearer as to the time
18 period applicable to claims brought against SL One Global, this
19 imprecision does not warrant dismissal.

20 B. Inclusion of Kickback Allegations

21 Defendants next take issue with the following
22 allegation: “During the Latest Investigation, the [Department of
23 Labor’s Wage and Hour Division (“WHD”)] received information that
24 Defendant Loloe and Defendant Montoya coerced employees who had
25 received back wage payments in resolution of WHD’s Second
26 Investigation to return these payments in the form of illegal
27 ‘kickbacks’ following the distribution of these back wage
28 payments to Defendants’ employees.” (FAC ¶ 37.) This paragraph

1 is incorporated by reference into Count I for interference with
2 FLSA rights; Count III for violation of minimum wage
3 requirements; and Count IV for violation of overtime wage
4 requirements. (See FAC ¶¶ 65, 71, 74.) Defendants only contest
5 the inclusion of kickback allegations as to Counts III and IV.
6 (See Def.'s Mem. at 4.)

7 Plaintiff alleges that the kickbacks constitute new
8 wage violations occurring after the Agreement Period under a
9 regulation providing:

10 Whether in cash or in facilities, "wages" cannot be
11 considered to have been paid by the employer and received by
12 the employee unless they are paid finally and
13 unconditionally or "free and clear." The wage requirements
14 of the Act will not be met where the employee "kicks-back"
directly or indirectly to the employer or to another person
for the employer's benefit the whole or part of the wage
delivered to the employee.

15 29 C.F.R. § 531.35. Under this regulation, "there would be a
16 violation of the Act in any workweek when the cost of [the
17 kickbacks] cuts into the minimum or overtime wages required to be
18 paid [the employee] under the Act." Id.; see also Rivera v. Peri
19 & Sons Farms, Inc., 735 F.3d 892, 897 (9th Cir. 2013) (to the
20 extent that kickbacks "lower an employee's wages below the
21 minimum wage, they are unlawful"). In other words, when a
22 kickback is at issue, a plaintiff must allege an underlying
23 minimum or overtime wage violation caused by the kickback. See
24 id.; Layton v. Mainstage Mgmt., Inc., No. 3:21-cv-1636-N, 2022 WL
25 2760533, at *3 (N.D. Tex. May 3, 2022) ("the cited regulation
26 does not independently authorize recovery of 'kickback'
27 payments," but rather the plaintiff must prove that the kickback
28 "caused their pay to fall below minimum wage").

1 Defendants' alleged conduct in obtaining kickbacks may
2 very well constitute a FLSA violation. See Stein v. HHGREGG,
3 Inc., 873 F.3d 523, 531 (6th Cir. 2017) ("Under the regulations,
4 it would be unlawful for an employer to require an employee to
5 return wages already 'delivered to the employee.'" (quoting 29
6 C.F.R. § 531.35). The question here is whether that alleged
7 violation occurred during the Agreement Period (in which case it
8 is precluded), or at the time the employees returned the back
9 wages to defendants.

10 Crucially, the First Amended Complaint does not allege
11 that the kickbacks were causally connected to any minimum or
12 overtime wage violation occurring after the Agreement Period.
13 But even if plaintiff had identified a correlate wage violation
14 occurring after the Agreement Period, the court rejects
15 plaintiff's argument that the court can treat the kickbacks as a
16 deduction from employees' wages owed at the time of kickback--
17 i.e., wages earned after the Agreement Period. The regulation
18 provides that wages "cannot be considered to have been paid" if
19 they are later kicked-back. 29 C.F.R. § 531.35. If the
20 employees returned their Agreement Period back wages, defendants
21 would be considered to have never paid those wages, which were
22 earned during the Agreement Period. Thus, the alleged kickbacks
23 would create anew a violation of FLSA's wage requirements as to
24 the Agreement Period.

25 Plaintiff has not cited, nor has the court found, any
26 authority applying the regulation in the way plaintiff's
27 opposition suggests. However, Donovan v. Crisostomo, 689 F.2d
28 869 (9th Cir. 1982), while it does not explicitly cite the

1 regulation at issue, is instructive. In Donovan, the employer
2 deducted employees' overtime wages from their straight time
3 wages. The court characterized this kickback as a violation of
4 the overtime wage requirement, even though the deduction was from
5 non-overtime wages. Id. at 876. Analogously, the alleged
6 kickback of Agreement Period back wages--even though it occurred
7 during a later pay period--should be viewed as a violation of
8 wage requirements applying to the Agreement Period.

9 Accordingly, plaintiff's kickback allegations under
10 Counts III and IV concern violations occurring during the
11 Agreement Period and are barred by the parties' Second Agreement.

12 IT IS THEREFORE ORDERED that defendants' motion to
13 strike (Docket No. 25) be, and the same hereby is, DENIED. IT IS
14 FURTHER ORDERED that Defendant's alternative motion to dismiss
15 (Docket No. 25) be, and the same hereby is, GRANTED, to the
16 extent that the First Amended Complaint alleges violations by SL
17 One Global occurring before February 19, 2020.

18 Plaintiff has twenty days from the date of this Order
19 to file a second amended complaint. On amendment, plaintiff
20 shall (1) clarify that no claims are brought against SL One
21 Global for violations occurring prior to February 19, 2020, and
22 (2) remove allegations of kickbacks of Agreement Period back
23 wages from Counts III and IV to the extent that they allege
24 violations by SL One Global.

25 Dated: December 15, 2022



26 WILLIAM B. SHUBB
27 UNITED STATES DISTRICT JUDGE
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